81-2174

Office - Supreme Court, U.S.
FILED
MAY 24 1982
ALEXANDER L. STEVAS,
CLERK

No. A-826

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

QUEENSGATE INVESTMENT COMPANY DBA HOLIDAY INN

vs.

LIQUOR CONTROL COMMISSION, STATE OF OHIO

On Appeal From The Supreme Court of Ohio

JURISDICTIONAL STATEMENT

SAMUEL MARSTON ALLEN*
M. MICHELE FLEMING

2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 621-2120
Attorneys for Appellants

*Counsel of Record

May 21, 1982

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTION PRESENTED

Whether Regulation 4301:1-1-44 of the Ohio Liquor Control Commission, which prohibits a duly licensed retail liquor permit holder from advertising the retail price of alcoholic beverages in any medium visible from outside the permit premises, violates the First and Fourteenth Amendments of the Constitution of the United States by suppressing the public dissemination of truthful information about a lawful activity.

PARTIES AND AFFILIATIONS

All of the parties appearing in the Supreme Court of the State of Ohio are listed in the caption. Appellant's parent corporation is Holiday Inns of America, Inc. Appellant has no subsidiaries. Affiliates of Appellant operate Holiday Inns in other Ohio cities and in other states.[1]

---

[1] Millcreek Investment Company, Ken Hills Investment Company, Riverfront Investment Company, Warren Hills Investment Company, Midtown Investment Company, Griffin Gate Catering Company, Eastland Catering Company, Rich Hills Operating Company, Cumberland Investment Company, Cambridge Investment Company, Park Hills Investment Company, Ohio Hills Investment Company, Indian Valley Realty Company, Great Northern Realty Company, Northern Hills Realty Company, Great Western Realty Company, Cove Lake Investment Company and Tex Ken, Inc.

TABLE OF CONTENTS

	Page
Question Presented	1
Parties and Affiliations	1
Opinions below	1
Jurisdiction	2
Constitutional, statutory provisions and regulation involved	2
Statement	4
The question is substantial	8
Conclusion	17
Appendix A	1a
Appendix B	10a
Appendix C	12a
Appendix D	13a
Appendix E	22a
Appendix F	24a
Appendix G	27a
Appendix H	30a

TABLE OF AUTHORITIES

Cases:	Page
Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977)	9, 13, 15
Beal v. *Franklin*, 428 U.S. 901 (1976)	9
California Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.* 445 U.S. 97 (1980)	9-10, 14
Carey v. *Population Services, Ltd.*, 431 U.S. 678 (1977)	9, 13
Central Hudson Gas & Electric Corp. v. *Public Service Comm'n of New York*, 447 U.S. 557 (1980)	7, 9, 11, 13, 16
Consolidated Edison Co. of New York, Inc. v. *Public Service Comm'n of New York*, 447 U.S. 530 (1980)	9, 10
Craig v. *Boren*, 429 U.S. 190 (1976)	10
First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978)	10
Friedman v. *Rogers*, 440 U.S. 1 (1979)	9, 10
Heir v. *Degnan*, 411 A.2d 194, 82 N.J. 109 (1980)	8
Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 50 U.S.L.W. 4267 (No. 80-1681, March 3, 1982)	9
In the Matter of R M. J, 50 U.S.L.W. 4185 (No. 80-1431, January 25, 1982)	7, 9, 15
Linmark Associates, Inc. v. *Township of Willingboro*, 431 U.S. 85 (1977)	9, 10, 13, 15, 16
Metromedia, Inc. v. *City of San Diego*, — U.S. — 69 L.Ed. 2d 800 (1981)	9, 10, 14, 15

Page

Mobil Oil Corp. v. *Rocky River*, 38 Ohio St. 2d 23, 309 N.E.2d 900 (1974) 6

Oklahoma Telecasters Ass'n v. *Crisp*, No. 81-439-W (W.D. Okla. Dec. 18, 1981) *appeal docketed*, No. 82-1058 (10th Cir. Jan. 18, 1982) 8, 14, 17

Opinion of the Justices to the Senate, 366 N.E.2d 1220, 373 Mass. 888 (1977) 8, 14

Society for the Welfare of Animals v. *Walrath*, 439 U.S. 810 (1979) 9

United States v. *O'Brien*, 391 U.S. 367 (1968) 6

Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) 8, 10, 12-13, 15

Wisconsin v. *Constantineau*, 400 U.S. 433 (1971) .. 10

Constitution, Statutes and Regulations:

United States Constitution:

First Amendment 2

Fourteenth Amendment 2

Twenty-first Amendment 2

Ohio Revised Code:

2917.11 (B) 17

4301.03 (E) 6

4301.10 (A) 4

4303.02-.23 4

4303.181 (A) 3, 5, 7

Page

4303.182 (A) 3, 5

4399.16 17

4511.19 17

Ohio Administrative Code:

4301:1-1-44 (A), (B) 3, 4, 7

4301:1-1-44 (C) 11

4301:1-1-46 (E) 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. A-826

QUEENSGATE INVESTMENT COMPANY DBA HOLIDAY INN

vs.

LIQUOR CONTROL COMMISSION, STATE OF OHIO

On Appeal From The Supreme Court of Ohio

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (App. A, *infra* 1a-9a) is reported at 69 Ohio St. 2d 361, — N.E.2d — (1982). The opinion of the court of appeals (App. D, *infa* 13a-21a) is not reported. Neither the entry of the court of common pleas (App. F., *infra* 24a-26a) nor the original entry of the Liquor Control Commission (App. G, *infra* 27a-29a) is reported.

JURISDICTION

This is an appeal from a final judgment entered pursuant to the decision of the Supreme Court of Ohio (App. A, *infra* 1a-9a) holding that Regulation 4301:1-1-44 of the Liquor Control Commission is valid. Appellant drew into question the validity of the regulation, insofar as it prohibits Appellant from advertising the retail price of its product outside the premises, as being repugnant to the Constitution of the United States. Judgment was entered February 24, 1982 by the Clerk of the Supreme Court of Ohio. The Supreme Court of Ohio held that the regulation is not repugnant to the constitution. A Notice of Appeal was filed with the clerk of that court on March 18, 1982 (App. H, *infra* 30a-31a). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (2).

CONSTITUTIONAL, STATUTORY PROVISIONS AND REGULATION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Twenty-First Amendment to the United States Constitution provides in pertinent part:

Section 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof is hereby prohibited.

Ohio Revised Code sections 4303.181 and 4303.182 provide in pertinent part:

4303.181 (A) Permit D-5a may be issued either to the owner or operator of a hotel or motel . . . only by the individual drink in glass and from the container, for consumption on the premises where sold, and to registered guests in their rooms . . .

4303.182 (A) Permit D-6 shall be issued to the holder of an A-1-A, A-2, C-2, D-2, D-3, D-4, D-5a, D-5b, or D-7 permit to allow sale under such permit between the hours of one p.m. and midnight on Sunday if such sale has been authorized under Section 4301.361 [4301.36.1] of the Revised Code and under the restrictions of such authorization. . . .

Regulation 4301:1-1-44 of the Liquor Control Commission, State of Ohio (Ohio Adm. Code 4301:1-1-44) provides in pertinent part:

4301:1-1-44 Advertising

No alcoholic beverages shall be advertised in Ohio except in the manner set forth in 4301:1-1-03 and as hereinafter provided.

(A) As to advertising on the premises, holders of Class C, D, and G permits shall not advertise the price per bottle or drink of any alcoholic beverage, or in any manner refer to price or price advantage except within their premises and in a manner not visible from the outside of said premises.

(B) Manufacturers and distributors of alcoholic beverages are permitted to advertise their products in Ohio.

Holders of Class C, D, and G permits shall be authorized to advertise in newspapers of general circulation, radio and television, on billboards, calendars, in or on public conveyances and in regularly published magazines. Advertising may include the retail price of the original container or packages, but such advertising may not in any manner refer to price advantage.

Subsequent enactment of law by the 102nd Ohio General Assembly prohibits the advertising of the retail price of beer in any media. See Page 6, Section 4301.211 of the Revised Code of Ohio.

STATEMENT

This case involves the question of the constitutionality of subsections A and B of Regulation 4301:1-1-44 of the Liquor Control Commission, State of Ohio. The regulation prohibits holders of C, D and G retail liquor permits[1] from including the price per bottle or drink or any reference to price advantage in advertising in any medium visible outside the premises.

The Appellant, Queensgate Investment Company (hereinafter "Queensgate"), operates the Holiday Inn in downtown Cincinnati, Ohio. It holds a D-5a-6 liquor permit for the entire motel premises, which includes a discotheque

---

[1] The State of Ohio is a "monopoly state" with respect to the manufacture, importation and sale of beer and intoxicating liquor. Ohio Rev. Code Section 4301.10(A)(1). These products may not be manufactured, distributed, transported or sold without a permit from the department of liquor control. Ohio Rev. Code 4301.10(A)(2). The State is the sole vendor "of spiritous liquor (more than 21% alcohol) at retail and to holders of permits authorizing the sale of such liquor . . . ." Ohio Rev. Code Section 4301.10(A)(3). The State issues nine classes of permits to entities ranging from manufacturers to druggists to charitable groups. Ohio Rev. Code Sections 4303.02-4303.23.

known as "Lucy's In The Sky" on the top floor. The permit entitles it to sell, for consumption on its premises, "beer and any intoxicating liquor at retail, only by the individual drink in glass and from the container."[2]

This case arose in 1978, when Appellant was charged with three violations of Regulation 4301:1-1-44 for alleged advertisment of the retail price and a price advantage of an alcoholic beverage in a circular off the permit premises. The alleged violations were based on the August, 1978 edition of Lucy's monthly newsletter, "Skywriting," a copy of which had been provided to the Commission by an unknown source. "Skywriting" was regularly mailed to approximately 200 registered members of Lucy's club, and was available on the premises. The copy obtained by the Commission announced upcoming special events, including a "Coy Bacon Being Traded Party" where drinks would be sold from 7-11 p.m. on a particular evening for 79¢, and a "Drink Exchange," whereby a lunch receipt from the dining room would entitle the holder to receive one drink for 50¢ at Lucy's plus a card for another drink at 50¢ in the dining room.

After a hearing on November 29, 1978, the Commission found Queensgate guilty of all three violations of the regulation and issued an order suspending Queensgate's permit for seven days. (App. G, *infra* 27a-29a) Queensgate appealed on several questions of evidence, statutory construction, construction of the regulation and its enabling legislation, and constitutionality.[3] The court of

---

[2] Ohio Rev. Code Sections 4301.181, 4303.182, *supra* p. 3.

[3] Unconstitutionality of an ordinance or regulation implemented by an administrative agency need not be argued before it, "for the issue of constitutionality can never be *administratively* determined." *Mobil*

common pleas reversed, placing of record an entry which stated that the Commission's order was not supported by reliable, probative and substantial evidence and was not in accordance with law. It did not specifically pass upon the assignments of error. (App. F, *infra* 24a-26a) The Commission appealed this ruling. The court of appeals reversed, holding, *inter alia,* that the regulation did not unreasonably restrain Queensgate's commercial speech.[4] Applying the test of *United States* v. *O'Brien,* 391 U.S. 367 (1968) (challenging the constitutionality of a federal law prohibiting the burning of draft cards as a restraint on "symbolic speech"), the court declared that the regulation is within the state's police powers, that it furthers a substantial governmental interest in discouraging the excessive consumption of alcoholic beverages, that it is unrelated to the suspension of free expression since it is directed towards the regulation of intoxicants rather than speech, and that the infringement is no greater than necessary to further that interest. (App. D, *infra* 13a).

Queensgate appealed to the Supreme Court of Ohio following the denial by the court of appeals of Queensgate's

---

Oil Corp. v. *Rocky River,* 38 Ohio St. 2d 23, 26, 309 N.E.2d 900, 902 (1974) (emphasis in original).

Regulation 4301:1-1-44 was promulgated pursuant to Ohio Rev. Code Section 4301.01(E), which empowers the liquor control commission to adopt "uniform rules and regulations governing all advertising with reference to the sale of beer and intoxicating liquor throughout the state and advertising upon and in the premises licensed for the sale of beer and intoximating liquor."

[4] It appears that the commercial speech question was first raised in argument before the court of common pleas. The appellate court stated in its opinion: "The only remaining issue raised by appellee below, and here, is whether the regulation, as applied to appellee, violates the guarantee of free speech under the First and Fourteenth Amendments, by unreasonably infringing upon the permit holder's right to engage in protected speech." (App. D, *infra* 20a).

application for reconsideration on the commercial speech issue alone. The Supreme Court of Ohio affirmed, echoing the court of appeals' rationale, but applying *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557 (1980). The court ruled that while Queensgate's advertisement was clearly protected speech, it believed the ban of off-premises price advertising[8] to advance directly the governmental interest in minimizing the evils of alcoholic beverages and to be no more extensive than necessary to achieve that purpose. (App. A, *infra* 6a-8a.)

---

[8] Subsection (A) of the regulation unambiguously forbids all advertising of price or price advantage either off the premises or in a manner visible from outside the premises. The language of subsection (B), however, would seem to suggest that a retail permittee such as Appellant may advertise the price of the "original container or packages."

The courts below rejected Appellant's argument that its conduct was within the permissive language of subsection (B) since it had merely stated the retail price of the beverage "by the individual drink in glass and from the container," which is the "container or package" in which it is authorized to sell. Ohio Rev. Code Section 4301.181(A), *supra* p. 3. The State has not disputed that the Commission interprets and applies the regulation as banning all off-premises advertising of the only unit by which permittees may sell for consumption on their premises. Further, the Commission views a statement of a price certain, such as Appellant made in "Skywriting," to be an illegal advertisement of price advantage even though there is no comparison to the permittee's regular price or to competitor's prices. Apparently, the Commission has its own standards of what it believes to be competitively advantageous.

See In the Matter of R M. J , 50 U.S.L.W. 4185, 4186 (No. 80-1431, January 25, 1982) (analysis of a rule based on the interpretation given to it by the enforcing entity where the language is unclear).

THE QUESTION IS SUBSTANTIAL

The Supreme Court of Ohio has declared constitutional a thirty-two year old regulation which forbids a duly licensed retail liquor permittee from publicly disseminating entirely truthful information about its lawful activity of selling alcoholic beverages, because of fears that the public will not use that information in their best self-interest. In so holding, the Ohio court has contravened a large body of law of this Court regarding the extent to which states may infringe upon the free exercise of commercial speech. The precise question of applying these precedents to advertising the retail price of alcoholic beverages has not been before this Court.[6]

This Court's decision in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), established that there is no exception to the First Amendment for even purely commercial speech, where the idea communicated is simply "I will sell you the X [product or service] at the Y price." 425 U.S. at 358. Since *Virginia Pharmacy*, this Court has refused to let stand any restraint

---

[6] Related questions have been and are before various courts. *See Oklahoma Telecasters Association* v. *Crisp*, No. 81-439-W (W.D. Okla. Dec. 18, 1981) *appeal docketed*, No. 82-1058 (10th Cir. January 18, 1982) (permanently enjoining the Oklahoma Alcoholic Beverage Control Board from enforcing against the plaintiff telecasters an article of the Oklahoma Constitution and a statute forbidding their solicitation or broadcast of advertisements for alcoholic beverages); *Opinion of the Justices to the Senate*, 366 N.E.2d 1220, 373 Mass. 888 (1977) (advisory opinion that proposed legislation to prohibit most advertising outside licensed premises presented substantial First Amendment problems); *Heir* v. *Degnan*, 411 A.2d 194, 202, 82 N.J. 109 (1980) (opining that a Division of Alcoholic Beverage Control regulation of price advertising by liquor retailers violated the First Amendment, except to the extent that it prohibited otherwise illegal price fixing between competitors).

on truthful advertising of lawful activity.[7] *In the Matter of R M. J*, 50 U.S.L.W. 4185, 4189-90 (No. 80-1431, January 25, 1982) (legal advertising); *Metromedia, Inc.* v. *City of San Diego*, — U.S. —, 69 L.Ed. 2d 800, 813 (1981) (off-site billboards); *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557, 563-72 (1980) (promotional activities by electric utilities); *Consolidated Edison Company of New York, Inc.* v. *Public Service Commission of New York*, 447 U.S. 530, 534-44 (1980) (bill inserts advocating nuclear power); *Society for the Welfare of Animals, Inc.* v. *Walrath*, 439 U.S. 810 (1979) (prices of veterinary services — vacated and remanded in light of *Bates* v. *State Bar of Arizona, infra*); *Bates* v. *Bar of Arizona*, 433 U.S. 350, 363-83 (1977) (prices of routine legal services); *Carey* v. *Population Services, Ltd.*, 431 U.S. 678, 700 (1977) (advertising and display of contraceptives); *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 94 (1977) (advertising of real estate); and *Beal* v. *Franklin*, 428 U.S. 901 (1976) (advertising of abortions — vacated and remanded in light of *Virginia Pharmacy, supra*).

Nor can it be maintained that there is any "alcoholic beverage" exception to rights otherwise protected by the Constitution. The Twenty-first Amendment is a partial exception to the operation of the Commerce Clause, which in no way abrogates the rights protected by the Bill of Rights and the Fourteenth Amendment. *California Liquor*

---

[7] Commercial speech which is not entitled to protection includes that which is deceptive or misleading, *Friedman* v. *Rogers*, 440 U.S. 1, 12 (1979), and that which relates to unlawful activity, *cf. Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 50 U.S.L.W. 4267, 4269 (No. 80-1681, March 3, 1982). There is no dispute in this case that Queensgate is engaged in lawful activity and that the prices stated were entirely truthful.

Dealers Ass'n. v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 107-08 (1980); *Craig* v. *Boren*, 429 U.S. 190, 206-07 (1976); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 436 (1971). The fact that a state has regulatory authority over a business entity does not justify a restriction on its speech.[8] *Consolidated Edison Co. of New York, Inc.* v. *Public Service Comm'n of New York*, 447 U.S. 530, 540 (1980); *Friedman* v. *Rogers*, 440 U.S. 1, 26 (1979); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 780 n. 16 (1978).

It is also clear that the off-premises price advertising ban is not merely a restriction of time, place or manner. In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976), the Court observed that such restrictions must be justified without reference to the content of the speech, must serve a significant governmental interest and must leave open alternative channels for communication of the information. *See also Metromedia, supra*, — U.S. at —, 69 L.Ed. 2d at 820 (prohibition of off-site billboard advertising addressed content and did not leave effective or affordable alternative channels of communication); *Linmark, supra*, 431 U.S. at 94 (prohibition of "for sale" and "sold" signs on real estate differentiated on the basis of content and did not leave other realistic avenues of communication).

The crux of this matter, then, is whether the State has a substantial interest to support the restriction on Queensgate's dissemination of truthful information about its lawful activity and, if so, whether the complete ban of off-

---

[8] Indeed, each of the commercial speech cases has concerned a business subject to governmental supervision or control. See *Virginia Pharmacy, Bates* and *Walrath, supra* (pharmacists', lawyers' and veterinarians' price advertising); *Carey* and *Franklin, supra* (abortion and contraceptives); *Metromedia, supra* (zoning); *Central Hudson* and *Consolidated Edison, supra* (public utilities).

premises price advertising directly advances that interest and is no more extensive than necessary to serve that interest. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U.S. 557, 564-66 (1980).

The governmental interest asserted in briefs by the Ohio Attorney General and accepted by the Ohio Supreme Court in its opinion below is "discouraging the excessive consumption of alcoholic beverages." 69 Ohio St. 2d 361, 366 (1982) (App. A, *infra* 8a). The existence and legitimacy of this interest was taken somewhat as a matter of faith by the Ohio courts, as no evidence concerning it was ever made a part of the record.[9] The substantiality of the asserted interest in promoting temperance by discouraging the dissemination of information about favorable prices is questionable in view of the fact that the State is the sole wholesale and retail vendor of alcoholic beverages in the original package, at prices substantially less per drink than are available from retail permittees such as Appellant. Advertisement of the prices offered by the State's own monopoly stores is permitted.[10] Moreover, the State eagerly collects permit fees, excise taxes and sales taxes from the permittees and from ultimate consumers.

Assuming, *arguendo*, the substantiality of the asserted interest, the nexus between the interest and the prohibition of

---

[9] *See* p. 15 *infra*.

[10]

> Manufacturers and distributors of spiritous liquor are hereby permitted to advertise their products in Ohio, and such advertising may contain the statement that spirituous liquor may be purchased in original packages together with the state store prices thereof. Advertising shall not in any manner misrepresent the products advertised and shall be dignified in make-up and not offensive to the good taste of the public.

Ohio Adm. Code 4301:1-1-44(C).

price advertising is an apprehension that people will use the information in a manner which the State believes to be contrary to their own self-interest. The Ohio Supreme Court believed that the restriction is constitutional because its goal is the regulation of intoxicants rather than speech. 69 Ohio St. 2d at 366 (App. A *infra* 8a). Yet this rationale is directly contrary to the repeated, unequivocal declarations of this Court that a state may not use a restraint on the dissemination of truthful information about lawful activity to attempt to manipulate conduct in furtherance of a nonspeech-related goal. Of the argument that advertisement of prescription drug prices would lead to excessive consumption of drugs, the Court said in *Virginia Pharmacy, supra,* 425 U.S. at 769-70:

> [O]n close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug information. . . .
>
> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. *Cf. Park-*

> *er* v. *Brown*, 317 U.S. 341, 87 L.Ed. 315, 63 S.Ct. 307 (1943). But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. We so hold.

The Court has adhered to the *Virginia Pharmacy* rule. *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 96-7 (1977) (prohibition of on-site real estate signs not justified by the fear that they could cause racially motivated panic selling); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 375-76 (1977) (ban on lawyer advertising of prices for routine legal services not warranted by concern that it would stir up litigation); *Carey* v. *Population Services, Ltd.*, 431 U.S. 678, 701 (rejecting the restraint of public dissemination about contraceptives to discourage promiscuity). In *Central Hudson, supra*, 447 U.S. at 566 n. 9, the Court observed that such suppressions on commercial speech in the reputed interest of a nonspeech-related policy have been reviewed with "special care," with the result that it has not approved any ban on truthful, non-deceptive information about lawful activity:

> If the First Amendment means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public.

Id. at 575 (Blackmun and Brennan, JJ., concurring).[11]

---

[11] Justices Brennan and Blackmun rejected the "four-part test" enunciated by the majority as providing inadequate protection for "truthful, nonmisleading, noncoercive commercial speech." 447 U.S. at 573 (Blackmun and Brennan, JJ., concurring).

See also Metromedia, Inc. v. *City of San Diego,* — U.S. —, 69 L.Ed. 2d 800, 813 (1981).

This case fits precisely into the mold of these precedents: the State fears that if the public is aware of the prices offered by various competitors, they will patronize the advertiser and drink more than they would if kept in ignorance. The cases cited and discussed above prohibit states from attempting to manipulate conduct by preempting the speaker's right to advertise and the listener's right to receive information in order to make his own decisions.

Moreover, the regulation is based on the unsubstantiated assumption that advertising will cause excessive consumption. There is no showing the prohibited conduct, advertising the retail price of the drink, poses any more problems than conduct already permitted, selling alcoholic beverages, advertising price by the bottle, and offering discounts.[12] Increased consumption is not the inevitable result of price advertising.[13] Rather, the most likely result of advertising is that those persons chosing to drink will be more likely to patronize establishments which offer favorable prices. The only predictable effect of this regulation, as of those

---

[12] The extent to which a permittee may discount the price of a drink is limited by another regulation, which prohibits the "giving away" of an alcoholic beverage. (Ohio Adm. Code 4301:1-1-46(E)).

[13] *See California Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 112 (1980) (resale price maintenance not shown to promote temperance); *Oklahoma Telecasters Ass'n.* v. *Crisp* (No. 81-439-W, December 18, 1981), *appeal docketed* (10th Cir. January 18, 1982) (no evidence that ban on alcoholic beverage advertising prevents alcohol abuse); *Opinion of the Justices to the Senate,* 366 N.E. 2d 1220, 1223-24 (1977) (casual prediction that a ban on off-premises advertising would deter over-consumption of alcohol thought contrary to the rationale in *Virginia Pharmacy* and *Carey* "that the First Amendment itself expresses a bias against keeping the public uninformed as part of an ostensible effort to better their condition.")

in *Virginia Pharmacy* and *Bates*, is to impair the ability of consumers to learn where their money can best be spent and to diminish the competition between retailers which would result from the free flow information. *See Virginia Pharmacy, supra*, 425 U.S. at 765; *Bates, supra*, 433 U.S. at 377. The irrationality of the alleged nexus is evident from the fact that persons must now patronize bars in order to determine the price of beverages, because the information is not available off the premises.

Furthermore, the State has offered no evidence to substantiate its belief that the prohibition of off-premises advertising directly discourages the excessive consumption of alcoholic beverages. This Court has refused to sustain restraints on commercial speech where the nexus between the asserted interest and the regulation was speculative. *See, e.g., In the Matter of R M. J* , 50 U.S.L.W. 4185, 4189 (No. 80-1431, January 25, 1982) (no record of how a limitation of the potential recipients for lawyer announcements advanced professional standards, or that an absolute prohibition was the only solution); *Metromedia, supra*, — U.S. —, 69 L.Ed. 2d at 828 (Blackmun and Brennan, JJ., concurring) (no evidence that off-site billboards actually impaired traffic); *Linmark, supra*, 431 U.S. at 95 (no showing that the prohibition of "for sale" and "sold" signs was needed to maintain an integrated community).

Finally, the State has failed to make any showing that the total ban of off-premises price advertising is not a more extensive restraint on free speech than is necessary to serve the alleged state interest. The State does not directly attack intoxication by prohibiting the offering of discount prices or by limiting the number of drinks which may be sold at a bargain price. It only prohibits off-

premises advertising of price, apparently reasoning that people will not go to permittees' places of business if they do not know the prices. The only sure result of the instant regulation is to restrict competition and withhold market information. The State has not even addressed its burden of showing that its interest cannot be adequately protected in some less constitutionally objectionable manner. *Central Hudson, supra* at 447 U.S. 570-71; *Linmark, supra,* 431 U.S. at 95-96.

Instead, the Supreme Court of Ohio offers this erroneous syllogism:

> The advertising of drink prices and price advantages would encourage and stimulate excessive consumption of alcoholic beverages; an advertising prohibition aids the interest in preventing that consumption. No less extensive a regulation would achieve the same purpose. Rather, in order to serve the same governmental interest, virtually any other regulation would be more extensive, e.g., increased prices, shorter hours, or reduced number of permits, would all place a greater burden on the permit holder.

69 Ohio St. 2d 361, 366-67, — N.E. 2d — (1982) (App. A, *infra* 8a). In so saying, the Ohio court ignores several crucial principles. First, as the alternatives it suggests for promoting temperance do not affect speech at all, they are *ipso facto* less extensive restraints on protected speech than is the ban of price advertising. Second, the court seems to forget that the State already prohibits the excessive consumption of alcohol directly through its criminal, liquor and traffic statutes.[14] Third, the court's

---

[14] The Ohio statutes prohibit, *inter alia*, disorderly conduct in public while voluntarily intoxicated, conduct creating a risk to oneself or to another while intoxicated and operation of any vehicle under the in-

rationale completely ignores the direction of this Court that the best means to help people perceive their best interests is to open the channels of communication rather than to close them.

As this Court emphasized in the above-cited portions of *Virginia Pharmacy, Linmark, Bates, Carey* and *Central Hudson,* the constitutional method of dealing with the potential misuse of a product is not to suppress truthful information about its availability or cost, but rather to make more information available. If the State is truly concerned about the evils of alcoholic beverages, it is free to combat the problem directly by freely using the marketplace of ideas to educate the public on the hazards of alcohol abuse. It might require permittees to participate in this effort, or require warnings of health hazards such as those required of drug, tobacco and diet soft drink manufacturers.[15]

CONCLUSION

In sum, the Ohio court has sanctioned exactly what this Court has forbidden: the suppression of truthful information about lawful activity because of the recipients' feared use of the information. The Supreme Court of Ohio's validation of the regulation is clearly contrary to this Court's

---

fluence of alcohol. Ohio Rev. Code Sections 2917.11(B), 4511.19. Further, a tavern keeper may not permit intoxication or drunkenness on the premises. Ohio Rev. Code Section 4399.16.

[15] Because of the existence of such untried alternatives, the district court in *Oklahoma Telecasters Ass'n* v. *Crisp,* No. 81-439-W (W.D. Okla. Dec. 18, 1981) *appeal docketed,* No. 82-1058 (10th Cir. Jan. 18, 1982), held that the state had failed to show that Oklahoma's constitutional and statutory prohibitions of alcoholic beverage advertising were the only solution for intemperance.

holdings that the interests of both the commercial speaker to advertise his product and of the consuming listener to receive information about the price of lawfully offered goods and services substantially outweigh the vague and paternalistic justifications for withholding public dissemination of such information. The advertising ban seeks to advance the asserted interest in temperance only by the indirect, unsubstantiated assumption that advertising would increase alcohol abuse. Furthermore, it is far more restrictive and less effective than other alternatives, many of which would involve no restraint on speech whatsoever.

Probable jurisdiction should be noted.[16]

Respectfully submitted,

Samuel Martson Allen*

M. Michele Fleming

Attorneys for Appellants
STRAUSS, TROY &
RUEHLMANN CO., L.P.A.
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 621-2120

*Counsel of Record

May 21, 1982.

[16] The Court may wish to consider summary reversal.